ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-6340

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SUPREME COURT, U.S.

RICHARD LEE DAWSON,

Petitioner,

-vs-

STATE OF NEW YORK,

Respondent.

Respondent's Brief in Opposition
to the
Petition for Writ of Certiorari to the
Supreme Court of New York
Appellate Division, Fourth Judicial Department

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Statement of the Case

Petitioner was charged with Forcible Rape (New York Penal Law §130.35) and Robbery, second degree (New York Penal Law §160.10).

At his request, he was tried before a judge without a jury. Just prior to the start of the trial, the trial prosecutor requested that the court exclude spectators from the courtroom during the victim's testimony. Defense counsel objected and the court allowed representatives of the press to remain, but excluded all others.

Just prior to the victim being called as a witness, the court excluded all spectators except representatives of the press from the courtroom. No specific objection was made, but defense counsel asked if the exclusion applied to the defendant's mother. The court, after determining that the defendant was an adult (he was 19), said that the mother was also excluded.

When the victim's testimony was completed, the courtroom was once again open to all.

After trial, petitioner was found guilty of the rape and robbery charges and sentenced.

The conviction was affirmed on appeal by the intermediate appellate court, and leave for further appeal was denied. The decision below, sub nom People v. Dawson, is reported in 84 A.D.2d 957 (Fourth Dept., 1981), 444 N.Y.S. 2d 333.

Argument

Petitioner's Constitutional rights were not violated, and in any event, the narrow question presented is not preserved for review.

Petitioner's major contention seems to be that his Sixth Amendment right to a public trial was violated by the trial judge's decision to exclude the public from the courtroom during the testimony of the victim.

Considering the recent decisions of this Court in Gannett Co. v. DePasquale, 443 U.S. 368 (1979) and Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), it is clear that the press and the public each have the right to attend a criminal trial, and the criminal defendant has the right to be tried before the public. Furthermore, "absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 581 (footnote omitted).

The courts of New York have recognized these rights, and there is no showing that the courts of New York have tended to limit them. Matter of Westchester-Rockland Newspapers, 48 N.Y.2d 430 (1979); Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707 (1980).

In this case, the public (but not the press) was excluded only during the testimony of the victim. The trial judge made that discretionary ruling pursuant to statute (New York Judiciary Law §4, McKinney's Consolidated Laws of New York, book 29).

It is clear from the trial transcript that there was some discussion of the prosecutor's motion before it was made: the opening remark by the judge was "I understand you had another application, Mr. Jesserer, with respect to the testimony of the victim."

The specific issue would appear to be whether petitioner at that point had a right to a hearing on the motion. Assuming he had such right, no such request was made. Later, when defense counsel asked whether the mother was to be excluded, it is not clear whether he was asking for clarification, or whether he was indicating an objection. What is clear is that no specific objection was made and no request for any particular person or persons to be allowed to remain was made.

The trial judge was simply exercising his discretion under the statute; his determination that the several rights involved could best be protected by allowing the press to remain and excluding all others, does not, by itself, violate the Constitution. In addition, the fact that the trial judge did not articulate specific findings doesn't mean he didn't consider the matter and make the necessary findings, at least sub silentio. Since there was only a general objection, the judge made a ruling with but a generalized comment. We would also point out that no detailed findings were necessary. The trial judge either believed justice would better be served

by allowing the witness to testify free from the embarrassment of public display, or he did not. This trial took place in 1976, long before the requirement for articulated findings was established.

We respectfully urge therefore that petitioner's Constitutional rights were not violated during the trial and that no substantial Constitutional question was preserved for review by this Court.

Conclusion

Petitioner's Constitutional rights were fully protected during the trial, and, in any event, no substantial Constitutional question is presented by the trial record. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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